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Nos. 82-1585 and 82-1586

In The

Supreme Court of the United States

October Term, 1982

ASSOCIATED MILK PRODUCERS, INC.,
Petitioner,

vs.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

MID-AMERICA DAIRYMEN, INC.,
Petitioner,

vs.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL MILK PRODUCERS FEDERATION, INC., IN SUPPORT OF PETITIONS FOR CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Milk Producers Federation, Inc. (the "Federation") through counsel, respectfully moves the Court, pursuant to Rule 36.1 of the Supreme Court Rules, for leave to file as an *amicus curiae* the brief submitted herewith prior to consideration of the petitions for writs of certiorari, consent having been refused. In support of this motion, the Federation states as follows:

1. The Federation is, as stated in its charter, a non-profit, non-stock corporation organized under Illinois law to "promote the welfare and protect the interests of dairy farmers and their cooperatives, to serve as a national trade association or business league for dairy farmers and their cooperatives, to represent them in matters affecting their interests and welfare, and to provide services for its members."

2. About 75% of the nation's milk supply is marketed through dairy cooperative marketing associations owned and operated by dairy farmers ("dairy cooperatives"). The Federation's membership is made up of such dairy cooperatives, including the petitioners in these cases, thus providing a representative voice at the national government level for the cooperatives and federations and, through them, for the dairy farmers they represent.

3. Among the Federation's principal functions are acting as a spokesman for dairy interests before all branches and agencies of the federal government whose actions may impact on the dairy industry. By such activity, the Federation seeks to influence federal executive, legislative, administrative and judicial action in a manner beneficial to Federation members and the dairy farming industry in general.

4. Under the decision below, representations through the Federation to federal courts or government agencies could become

a part of the evidentiary record in an antitrust action against a member cooperative and thereupon be considered as a part of the "record as a whole" in a determination that an otherwise individual predatory act by such member was done in concert with one or more other cooperatives. The decision below thus threatens erosion of the First Amendment's assurances of the right to petition government which are guaranteed and protected under prior decisions of this Court, and the threat goes directly to the area and manner in which the Federation itself functions.

5. In addition to the First Amendment issue, the decision below presents an important issue with respect to the very definition of agricultural marketing cooperative associations whose marketing activities enjoy antitrust immunity under federal law. The Federation not only represents its members, but advises them on practical federal issues such as the question presented by the decision below whether poor policing of membership resulting in membership by non-farmers may not always disqualify joint marketing activities for statutory antitrust immunity.

6. The participation proposed by the Federation is limited to two questions specifically raised in each of the petitions for certiorari in Nos. 82-1585 and 82-1586. The Federation's brief is intended to provide the Court with information and analysis useful in assessing the importance of these issues, beyond that available from the perspectives of the parties alone. Its receipt will not expand or delay the proceedings, and will contribute to a just and speedy resolution.

WHEREFORE, The National Milk Producers Federation, Inc., respectfully prays that the Court grant it leave to file its brief submitted herewith as an *amicus curiae* in support of petitions

for certiorari, and for such other relief as to the Court may seem just.

April 15, 1983

Respectfully submitted,

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL MILK PRODUCERS FEDERATION, INC., IN SUPPORT OF PETITIONS FOR CERTIORARI

The National Milk Producers Federation, Inc. ("Federation") respectfully submits this brief *amicus curiae* in support of petitions for writs of certiorari filed on behalf of petitioners Associated Milk Producers, Inc. ("AMPI") and Mid-America Dairymen, Inc. ("Mid-Am").

QUESTIONS PRESENTED

The Federation joins these petitioners in urging review of the following two questions raised by the decision below:

> 1. Whether First Amendment petitioning and Capper-Volstead Act agricultural cooperative marketing activities, sheltered by national policy of constitutional dimensions against *direct* antitrust attack, may nonetheless be considered as part of defendants' conduct "as a whole"[1] to determine whether predatory conduct of individual cooperatives was conspiratorial in character,[2] and
>
> 2. Whether non-farmer members do not always disqualify their organization for antitrust immunity under §1 of the Capper-Volstead Act, 7 U.S.C. §291 *et seq.*[3]

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1. *E.g.*, 687 F.2d at 1193.

2. This issue is set forth in Question 2 of the Questions Presented in the Petition of AMPI, No. 82-1585 and Question 2 of the Questions Presented in the Petition of Mid-Am, No. 82-1586.

3. This issue is set forth in Question 3 of the Questions Presented in the Petition of AMPI, No. 82-1585 and Question 5 of the Questions Presented in the Petition of Mid-Am, No. 82-1586.

TABLE OF CONTENTS

Page

Questions Presented ii

Table of Contents iii

Table of Citations iii

Opinions Below 1

Constitutional and Statutory Provisions Involved 1

The Unique Interest of the National Milk Producers Federation, Inc. 2

Statement of the Case 3

Reasons for Granting the Writ:

I. The decision below erodes the *Noerr-Pennington* Doctrine and the Capper-Volstead exemption. 7

II. The Court should grant review to clarify the effect of non-farmer members on an organization's entitlement to Capper-Volstead immunity. 10

Conclusion 11

TABLE OF CITATIONS

Cases Cited:

Alexander v. National Farmers Organization, 687 F.2d 1173 (8th Cir. 1982) ..... passim

Contents

Page

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 4, 7

Case-Swayne Co., Inc. v. Sunkist Growers, Inc. ("Sunkist II"), 389 U.S. 384 (1967) 6, 10

Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 4, 7, 9

Federal Trade Comission v. Cement Institute, 333 U.S. 683 (1948) 8

Heike v. United States, 227 U.S. 131 (1913) 8, 9

Maryland & Virginia Milk Producers Assoc. v. United States, 362 U.S. 458 (1960) 7

Midwest Milk Monopolization Litigation, 510 F.Supp. 381 (1981) 1

National Broiler Marketing Association v. United States, 436 U.S. 816 (1978) 6, 10

Standard Oil Co. v. United States, 221 U.S. 1 (1911) 8

Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co. ("Sunkist I") 370 U.S. 19 (1962) 7

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 4, 5, 7, 8, 9

United States v. Reading Co., 253 U.S. 26 (1920) 8

Contents

Page

Statutes Cited:

Capper-Volstead Act, 7 U.S.C. §291 .....ii, 1, 4, 6, 7, 9, 10

Clayton Act, Section 6, 15 U.S.C. §17 1

Sherman Act, Section 1, 15 U.S.C. §1 2

Sherman Act, Section 2, 15 U.S.C. §2 2

United States Constitution Cited:

First Amendment .....ii, 1, 4, 9

OPINIONS BELOW

The opinion of the court of appeals is reported at 687 F.2d 1173. The opinion of the United States District Court for the Western District of Missouri is reported at 510 F.Supp. 381.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment I to the Constitution of the United States provides, in pertinent part:

> Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances.

The Capper-Volstead Act, 7 U.S.C. §291, provides, in pertinent part:

> Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . .

Section 6 of the Clayton Act, 15 U.S.C. §17, provides:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the

> antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

Section 1 of the Sherman Act, 15 U.S.C. §1, as amended, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Section 2 of the Sherman Act, 15 U.S.C. §2, as amended, provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

THE UNIQUE INTEREST OF THE NATIONAL MILK PRODUCERS FEDERATION, INC.

The Federation is, as stated in its charter, a non-profit, non-stock corporation organized under Illinois law to "promote the

welfare and protect the interests of dairy farmers and their cooperatives, to serve as a national trade association or business league for dairy farmers and their cooperatives, to represent them in matters affecting their interests and welfare, and to provide services for its members."

About 75% of the nation's milk supply is marketed through dairy cooperative marketing associations owned and operated by dairy farmers ("dairy cooperatives"). The Federation's membership is made up of such dairy cooperatives, including the petitioners in these cases. The Federation thus provides a representative voice at the national government level for the cooperatives and federations and, through them, for the dairy farmers they represent.

Among the Federation's principal functions are acting as a spokesman for dairy interests before all branches and agencies of the federal government whose actions may impact on the dairy industry. By such activity, the Federation seeks to influence federal executive, legislative, administrative and judicial action in a manner beneficial to Federation members and the dairy farming industry in general.

Assurances that dairy farmers may market collectively and seek, by lawful speech and petition, to influence public policy and government action, without fear of antitrust liability, are crucial to the effectiveness of the Federation as a body and to the welfare of its members. The decision below threatens erosion of these assurances. Therefore, the Federation joins petitioners in urging review.

STATEMENT OF THE CASE

The nature and posture of the case are well-stated in the petitions and this statement will be confined to matters specific to the points upon which the Federation supports review.

In its portions bearing on the use of evidence of exempt conduct, the decision below first affirmed the lawfulness pursuant to the Capper-Volstead Act of various cooperative marketing activities of petitioners. These included memberships of the cooperatives in each other, joint marketing agreements among them, and their representation of each other as marketing agent (687 F.2d at 1182).

Second, the decision recognized the exempt nature of certain activities in accordance with this Court's decisions interpreting the First Amendment right to petition government in the *Noerr*,[4] *Pennington*,[5] and *Trucking Unlimited*[6] cases.[7] These activities included government contacts aimed at blocking the qualification of National Farmers' Organization, Inc. ("NFO") as a marketing cooperative and the bringing of good faith litigation against NFO claiming solicitation by NFO of petitioners' members to violate their milk marketing agreements with petitioners (687 F.2d at 1195, 1200).

Third, the court found other actions by each of the petitioners individually to be predatory and not exempt under either Capper-Volstead or *Noerr-Pennington*. These included instances of short-shipping, late delivery, price discrimination, threatened supply cutoff, and threatened or actual litigation against NFO customers

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4. *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

5. *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965).

6. *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972).

7. The body of constitutional doctrine expounded in these three cases is hereinafter sometimes referred to as the "*Noerr-Pennington* Doctrine."

for purchase from NFO of milk allegedly contracted to a petitioner (687 F.2d at 1196-1204).

To demonstrate concert in connection with actions of this third sort, the court adverted to the evidence of petitioners' exempt marketing practices and First Amendment activities "as a whole" (687 F.2d at 1193-1195). In the court's opinion, sanction for viewing exempt and nonexempt conduct "as a whole" for this purpose was found in the following note in *Pennington* (cited 687 F.2d at 1196):

> It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny. [Citations omitted]." *Federal Trade Comm'n v. Cement Institute,* 333 U.S. 683, 705 [additional citations omitted].[8]

In another part of its decision, the court below overturned a trial court finding that NFO's milk marketing activities did not constitute price-fixing. It went on to find, however, that NFO would enjoy antitrust immunity for this activity as an agricultural cooperative organization. It recognized that NFO at relevant times had had non-farmer members, and that this Court, in its 1978

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8. *Pennington, supra,* 381 U.S. at 670, n. 3 (hereinafter sometimes, "the *Pennington* note").

National Broiler[9] decision, had held that the inclusion of "*even one*" member who was not a farmer would disentitle an organization to the protection of the Capper-Volstead Act.[10]

The court below avoided that result by two alternative routes:

First, it suggested that *National Broiler's* strict requirement announced in 1978 should not be applied retroactively to the late 1960's and early 1970's membership practices in this case (687 F.2d at 1187). This theory was advanced in spite of the appeals court's recognition (687 F.2d at 1186) that *National Broiler's* "only farmers" rule was foreshadowed in 1967 by this Court's "*Sunkist II*" decision.[11]

Second, the court below modified this Court's *National Broiler* language. Non-farmer members would not necessarily disqualify an organization for Capper-Volstead Act immunity unless they were vertically integrated "middlemen" for whom an exemption was actually claimed (687 F.2d at 1186).

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9. *National Broiler Marketing Association v. United States*, 436 U.S. 816 (1978).

10. *Id.*, 436 U.S. at 822-23, 828-29.

11. *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384, 391-393 (1967).

REASONS FOR GRANTING THE WRIT

I.

The decision below erodes the *Noerr-Pennington* Doctrine and the Capper-Volstead exemption.

This decision merits review because it conflicts in principle with this Court's decisions in *Noerr, Pennington* and *Trucking Unlimited* and decisions applying the Capper-Volstead Act.[12]

The freewheeling use by the court below of exempt conduct evidence to cement the discrete stones of individual conduct into a wall of conspiracy is novel and expansive. The very "jointness" of cooperative marketing activities — the very factor about them suggesting the need for an exemption — is taken as general support for an inference that ostensibly individual actions against NFO must also have been joint (687 F.2d at 1192-1208). Such prejudicially unlimited use of evidence of protected conduct unduly burdens its exercise. It offends the policies underlying this Court's prior decisions precluding the basing of antitrust violations on such evidence and, by necessary corollary, confining any use of such evidence narrowly to a specific purpose.

In *Pennington,* for example, this Court struck down an instruction permitting a jury to find illegality in defendants' petitioning of TVA and the Secretary of Labor if they found it to be "part of a conspiracy to drive small operators out of business." Such conduct, the Court held, "is not illegal, either standing alone or as *part of* a broader scheme itself violative of

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12. *See, e.g., Maryland & Virginia Milk Producers Assoc. v. United States,* 362 U.S. 458, 466 (1960); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19 (1962) ("*Sunkist I*").

the Sherman Act [*emphasis supplied*]."[13] In the instant case, the court below formally distinguished its use of exempt conduct from that condemned in *Pennington* on the basis of the note quoted above (allowing *limited* use of such evidence where deemed probative and *not unduly prejudicial* to prove purpose and character). In substance, however, the use made of the exempt conduct was just to do indirectly what could not be done directly. The exempt conduct became a vital *part of* the conspiracy found — the very mortar used to cement into a structure of conspiracy what otherwise appeared as individual acts.

An overview of the citations in the *Pennington* note poses a most serious question whether this Court ever intended to authorize this kind of broad, general, untrammeled reliance on evidence of exempt conduct.

In the *Standard Oil,*[14] *Reading Co.,*[15] *Cement Institute*[16] and *Heike*[17] cases (this Court's decisions cited in the *Pennington* note) the uncharged acts consisted of a single, uninterrupted course of conduct extending over a protracted period. Only a small portion of this period was, in the language of the *Pennington* note, "the transaction under scrutiny." Where a single purposeful activity has gone on over a protracted period, an examination of that activity at various times through history can, indeed, be limited to its logical relevance to the nature and purpose of the "transactions under scrutiny."

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13. *Pennington, supra,* fn. 5, 381 U.S. at 670.

14. *Standard Oil Co. v. United States,* 221 U.S. 1, 46, 47 (1911).

15. *United States v. Reading Co.,* 253 U.S. 26, 43-44 (1920).

16. *Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 705 (1948).

17. *Heike v. United States,* 227 U.S. 131, 145 (1913).

The *Heike* case well expresses the accepted pattern of admissibility for a limited purpose in these cases:

> Another objection to evidence concerned the admission of testimony that the same course of conduct was going on long before the date in the indictment when it is alleged that the defendants conspired. The indictment, of course, charged a conspiracy not barred by the statute of limitations, but it was permissible to prove that the course of fraud was entered on long before and kept up. [Citations omitted.][18]

But such a pattern is grossly unlike the instant situation of extensive general reliance on contemporaneous exempt conduct.

The *Pennington* note refers in terms only to "prior or subsequent" conduct and not to contemporaneous conduct such as that at bar. Its inclusion in *Pennington* does imply that some limited evidentiary consideration of contemporaneous exempt conduct can be appropriate. Yet *Noerr-Pennington* and Capper-Volstead represent strong constitutional and legislative policies to encourage the protected activities, by relieving participants from the burden of fear that their conduct will form the basis of antitrust liability.

Thus, this Court's review is urgent to provide guidelines for balancing, on the one hand, the evidentiary policies served by a broad, general use of exempt conduct, and on the other, the important First Amendment petitioning and Capper-Volstead rights emphasized by this Court's prior decisions.

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18. *Ibid.*

II.

The Court should grant review to clarify the effect of non-farmer members on an organization's entitlement to Capper-Volstead immunity.

One of the functions served by the Federation is to advise its member cooperatives on issues of interest to them. The decision below, in asserting that exceptions exist to the teaching of this Court in *Sunkist II*[19] and *National Broiler*[20], has thrown into doubt a question that previously appeared clearly answered.

Review should be granted to make clear whether a single member who is not a farmer disqualifies an organization from the benefits of the Capper-Volstead Act. If there is a *de minimis* number of non-farmer members who will not disqualify; if the requirements have evolved and are different now than during the period covered by the record in this case, it is important for the Federation and its member cooperatives, as well as other Capper-Volstead cooperatives within and outside the dairy farming industry, to know so that they may govern their practices accordingly.

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19. *Case-Swayne Co., Inc. v. Sunkist Growers, Inc., supra,* fn. 11.

20. *National Broiler Marketing Association v. United States, supra,* fn. 9.

CONCLUSION

For the foregoing reasons, the Federation respectfully urges this Court to grant the petitions for review as to the questions hereinbefore discussed.

April 15, 1983

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